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IN THE

Supreme Court of the United States

October Term 1975

No. 75-155

JAMES V. LARKIN,

Petitioner,

v.

JOHN R. PATTERSON, et al.,

Respondents.

BRIEF IN OPPOSITION TO CERTIORARI

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Jurisdiction

The jurisdictional requisites are adequately set forth in the petition, except that, of the petitioners named in the caption, only James V. Larkin was a party to the proceedings in the Court of Appeals and is properly before this Court (1a, 45a).[1]

Questions Presented

1. Whether, in an employment discrimination action brought on behalf of racial and ethnic minorities, the plaintiffs and defendants can enter into a consent decree which

[1] This form of citation is to pages of the appendix to the Petition for Certiorari.

grants relief to all disadvantaged workers, but grants minority workers some relief not granted to white workers?

2. In an employment discrimination action, whether the parties can enter into a consent decree which specifies a temporary one-minority-for-one-white ratio for filling vacancies in that hiring priority group which provides regular employment and from which minorities have been discriminatorily excluded?

Statement

This action is a consolidation of a suit brought by private plaintiffs under Title VII of the Civil Rights Act of 1964[2] and 42 U.S.C. §1981 and a pattern and practice suit brought by the United States[3] under Title VII to redress employment discrimination against minorities in the delivery departments of the New York City area newspaper and magazine publishers and distributors. Private plaintiffs were three black men who had "shaped" at the New York Times ("the Times") and the New York Daily News ("the News") but were denied access to the hiring priority group which assured regular employment in the industry. Defendants were some fifty publishers and publication distributors ("the employers") and the union having jurisdiction over the employees in their delivery departments, the Newspaper and Mail Deliverers' Union of New York City and Vicinity ("the union"). Approximately 100 non-union non-minority persons working as extras in the delivery department of the News, of whom petitioner is one, were permitted to intervene for the limited purpose of presenting

[2] 42 U.S.C. §§ 2000e *et seq.*

[3] The Equal Employment Opportunity Commission was substituted for the United States as plaintiff in accordance with 42 U.S.C. §§ 2000e-6(c) and (d).

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evidence and argument "with respect to the narrow question of relief to be granted should the plaintiffs prevail."

The gravamen of this action is that the collective bargaining agreements entered into between the union and the employers have, by their terms and in their uneven application, operated to discriminate against minorities by providing for continual preferential hiring of the 99% white union membership and to perpetuate past minority exclusion from the union and from regular employment in the industry.

The Hiring System

Because of variations in the size and quantity of publications to be distributed on a given day, employers' needs for delivery personnel vary from day to day. Employers, therefore, depend on a regular work force with permanently assigned jobs (Regular Situation Holders) and daily extra shapers. The daily shapers are divided into four groups with descending priority for both daily hiring and movement into Regular Situations.

Each employer has its own Group I list which has shaping priority at each shift, in order of shop seniority, and is, by the terms of the collective bargaining agreement, limited to persons who once held a Regular Situation in the industry. These Group I shapers have either been laid off as a Regular Situation Holder by their current employer or another employer, or have voluntarily transferred to their current employer's Group I list from positions as Regular Situation Holders or Group I shapers elsewhere in the industry. The Group II list is an aggregate industry-wide list consisting of all present Regular Situation Holders and Group I shapers in order of their date of membership in the Union, and it has hiring priority at a given

shift of an employer after that employer's Group I list is exhausted. Individuals may use their Group II status to obtain daily extra work at any employer in the industry except their own. Each employer has its own Group III list which has shaping priority in order of shop seniority after all Group I and Group II men present at a shift are put to work. Group IV shapers work after Group III and are required to shape only occasionally.

Regular Situation Holders and Group I and Group II shapers are union members, having been admitted, generally, when they first obtained Regular Situations. Group III and Group IV shapers are not eligible for union membership. Regular Situation Holders and Group I shapers are, as a practical matter, assured of steady employment. Other shapers are not.

While, theoretically, vacant Regular Situations are filled first from an employer's Group I list and, when that is exhausted, from the Group III list, in fact, because of industry layoffs and a variety of abuses of the hiring system, which resulted in a steady flow of union members and their relatives and friends onto the Group I lists, no Group III shaper had, prior to this action, moved into a Regular Situation and thus into union membership at the News or the Times, the most desirable shops in the industry, since 1963.

The union was founded in 1901 and historically limited its membership to the first born legitimate son of a member. See *N.L.R.B.* v. *Gaynor News Co.*, 347 U.S. 17, 35 (1953). Until the above-described hiring system was adopted in 1952, the industry had a closed shop in which union members were hired before non-union men. At the time of trial, the union had approximately 4200 members, of whom about 40 were minorities.

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Proceedings Below

After a four-week hearing on plaintiffs' motions for a preliminary injunction, which was consolidated with a trial on the merits, the EEOC, private plaintiffs, the employers and the union entered into a settlement agreement. This agreement was designed to eliminate abuses of the hiring system and to provide opportunities, for the first time, for whites and minorities alike to move up to the Group I lists and into Regular Situations, and to obtain union membership. The only part of the settlement agreement that petitioner objects to is that section which provides that one minority shall be added to the Group I list from the Group III list for each non-minority so added. Since at the time of trial, of 178 Group III members at the News only 13 were minorities, implementation of this provision requires that non-minorities already on the Group III list be matched by minorities new to the industry.

After two hearings with respect to the fairness and adequacy of the settlement agreement, it was approved by the District Court, which found, *inter alia,* that the agreement, far from injuring non-minorities, substantially benefitted them (35a-36a), that Group I was the entry point into regular employment in the industry, and that before the agreement there was in effect no seniority system governing promotion from Group III to Group I (37a). The Court of Appeals affirmed (13a, 15a).

ARGUMENT

This case does not warrant review on certiorari because the decision of the Court of Appeals is in accord with this Court's prior decisions and there is no conflict among the circuits on the questions presented.

This Court has recognized conciliation and settlement as "the preferred means" for achieving the elimination of unlawful employment discrimination. *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 44 (1974). In the instant case, the EEOC, a class of private plaintiffs, the union and some 50 employers have, after a four-week trial and strenuous negotiations, entered into a settlement agreement which has been in effect for a year and has already benefitted several hundred employees, minority and non-minority alike, in terms of providing regular employment and realistic expectations of advancement. Petitioner is the only one of about 100 non-minority intervenors who appealed. He is a matriculated chemistry major at City University of New York who shapes off the Group III list of the Daily News but has no serious interest in full-time work in the industry.[4] Petitioner did not ask this Court for a stay of the District Court's order approving the agreement. It would be inequitable to permit petitioner to challenge the agreement now, when petitioner could have done so in a way that would have minimized the disruption which would result from vacating the agreement after it has been in effect for a year.

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[4] The record shows that petitioner did not by any means take full advantage of the employment opportunities that were available at the News. In calendar 1973 petitioner worked 136 shifts while a man two places above him on the Group III list worked over 200 shifts.

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1. *Petitioner Is Not Entitled To Relief Under Title VII.*

Petitioner has never claimed that he was denied union membership or employment opportunities on account of his "race, color, religion, sex, or national origin" 42 U.S.C. §§2000e-2(a)(1) and (c)(1). He claims, rather, that he was discriminated against because he was not the son of a union member. Not only does Title VII fail, by its terms, to afford relief for this type of discrimination, but the legislative history indicates that this omission was intentional. During debate on Title VII the House rejected an amendment offered by Representative Cahill which would have made it an unlawful employment practice to exclude qualified persons from union membership for any reason. A stated purpose of the amendment was to eliminate nepotism in union admissions. Opponents of the amendment made it clear that such broad reform was beyond the scope of Title VII. 110 Cong. Rec. 2593-95 (1964).

Courts of Appeals which have considered the question are in agreement with the courts below that relief under Title VII is available only to those who have been victims of the type of discrimination, e.g., racial, proscribed by the statute. *United States* v. *Bethlehem Steel Corp.*, 446 F.2d 652, 665 (2nd Cir. 1971); *United States* v. *Chesapeake & Ohio Ry. Co.*, 471 F.2d 582, 588-89, 593 (4th Cir. 1972). Cf. *Gamble* v. *Birmingham Southern Railroad Co.*, 514 F.2d 678, 686 (5th Cir. 1975).

United States v. *Roadway Express, Inc.*, 457 F.2d 854 (6th Cir. 1972), relied upon by petitioner, is not to the contrary. It does not stand for the proposition that non-minorities are entitled to relief under Title VII. There the Court of Appeals simply refused to vacate a consent decree which provided relief for white as well as black employees; it did not hold that Title VII *required* the granting of such relief.

2. *The Affirmative Relief Afforded By The Consent Decree Does Not Involve Any Bumping of Incumbent Employees.*

Petitioner's claim that the one-to-one ratio for additions to the Group I list entails the bumping of incumbent Group III employees by newly hired minority employees is contrary to the findings of the courts below. Group III shapers are not steadily employed, and many of them, like petitioner, do not intend to work full time (37a). They compete with a fluctuating group of shapers having higher priority for work which varies widely in amount from day to day (15a). "[T]he effective point of entry into employment in the industry has been at Group I, not Group III" (*id.*). Moreover, while it was theoretically possible, prior to this litigation, for a Group III shaper to move up into a Regular Situation, there could be no realistic expectation of such promotion (*id.*).[5]

Affirmative relief in the form of hiring ratios and goals to remedy long standing patterns of discrimination in employment have been approved by nine circuits.[6]

Even assuming, for purposes of argument, that Group III shapers did have seniority rights that were interfered

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[5] No Group III shaper had moved into a Regular Situation since 1963 (37a).

[6] *E.g.*, *Boston Chapter, NAACP* v. *Beecher*, 504 F.2d 1017 (1st Cir. 1974), *cert. denied* 95 S.Ct. 1561 (1975); *United States* v. *Local 46, Lathers*, 471 F.2d 408 (2nd Cir. 1973), *cert. denied* 412 U.S. 939 (1973); *Erie Human Relations Commission* v. *Tullio*, 493 F.2d 371 (3rd Cir. 1974); *Local 53, Asbestos Workers* v. *Vogler*, 407 F.2d 1047 (5th Cir. 1969); *United States* v. *Local 212, IBEW*, 472 F.2d 634 (6th Cir. 1973); *United States* v. *Local 169, Carpenters*, 457 F.2d 210 (7th Cir. 1972), *cert. denied*, 409 U.S. 851 (1972); *Carter* v. *Gallagher*, 452 F.2d 315, 327 (8th Cir. 1972) (*en banc*), cert. denied, 406 U.S. 950 (1972); *United States* v. *Local 86, Ironworkers*, 443 F.2d 544 (9th Cir. 1971), *cert. denied*, 404 U.S. 984 (1971), aff'g 315 F.Supp. 1202 (W.D. Wash. 1970); *Northeast Construction Co.* v. *Romney*, 485 F.2d 752 (D.C. Cir. 1973).

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with by the decree, at least four circuits have approved decrees or affirmative action plans permitting "new" minorities to enter hiring or referral groups ahead of non-minorities already in the bargaining unit.[7]

3. *The Employers and the Union Had the Right To Modify the Hiring System.*

The affirmative action program contained in the settlement agreement can be justified on the independent ground that it is no more than an agreement between the union and the employer modifying the hiring system previously agreed to in the collective bargaining agreements. Even if the provision requiring the addition of minorities to the Group I lists on a one-to-one ratio with whites did operate to deprive Group III shapers of any rights they would otherwise have had by virtue of their seniority, the agreement must be upheld under the rationale of *Ford Motor Co.* v. *Huffman,* 345 U.S. 330 (1952), where this Court upheld a collective bargaining agreement which credited employees with the time spent in military service *prior* to their employment in computing their seniority. The priority afforded to minorities in furtherance of the public policy of eliminating discrimination in employment[8] can be no less in the public interest than crediting employees with time spent in military service.

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[7] *Contractors Association* v. *Secretary of Labor,* 442 F.2d 159 (3rd Cir. 1971), *cert. denied,* 404 U.S. 854 (1971); *Southern Illinois Builders Ass'n* v. *Ogilvie,* 471 F.2d 680, 684-86 (7th Cir. 1972); *United States* v. *Sheet Metal Workers Local 36,* 416 F.2d 123 (8th Cir. 1969); *United States* v. *Local 86, Ironworkers, supra.*

[8] *Alexander* v. *Gardner-Denver Corp.,* 415 U.S. 36, 44 (1974); *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792, 800 (1973); *Griggs* v. *Duke Power Co.,* 401 U.S. 424, 429-30 (1971).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for certiorari should be denied.

Respectfully submitted,

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